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No. 07-584

FILED
NOV 30 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

WALTER OWENS, et al.,

Petitioners,

v.

MONSANTO COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition, where the Eleventh Circuit's Opinion affirming the district court does not conflict with the decision of this Court or a court of appeals, and there is no conflict between a federal question and a state court decision. Rather, Petitioners are merely dissatisfied with the amount they were awarded in the courts below, and are attempting to get this Court to allow them to receive more money.

CORPORATE DISCLOSURE STATEMENTS PURSUANT TO SUPREME COURT RULE 29.6

The Respondent, Monsanto Company, now known as Pharmacia Corporation, is wholly owned by its parent corporation Pfizer Inc.

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INTRODUCTION

This Petition is totally void of any compelling reason for this Court to exercise jurisdiction:

- There is no split within the circuit courts.
- There is no special or important reason that reaches constitutional proportion.
- There is no conflict with any of this Court's prior decisions.
- There is no conflict between a federal question and a state court decision.

See Sup. Ct. R. 10.

Rather, this case involves Petitioners who are dissatisfied with the amount the lower courts awarded and who have repeatedly attempted to get federal and state courts to award them more money. This matter started when the Petitioners filed a Motion to Enforce Settlement Agreement in a federal district court. The district court found in favor of the Petitioners, awarding them over 1.3 million dollars pursuant to a Most Favored Nations clause ("MFN clause"). Because they were dissatisfied with this amount, Petitioners wandered from forum to forum in an attempt to secure more money. After winning in the district court, yet being dissatisfied with the amount, Petitioners first requested a rehearing, and after it was denied, appealed to the Eleventh Circuit. The Eleventh Circuit affirmed, and Petitioners filed a Petition for Rehearing En Banc that was denied.

Petitioners did not appeal that decision to this Court. Next, Petitioners filed a lawsuit in Missouri state court again requesting more money under the MFN clause. The federal district court enjoined Petitioners from challenging the court's prior order. Petitioners appealed again to the Eleventh Circuit which affirmed the district court's decision to enter an injunction. Petitioners then filed a Petition for Rehearing, which was denied, and a Petition for Rehearing En Banc, which was denied.

Petitioners have repeatedly defied the federal courts' authority, embedded in the well-established principles of res judicata and collateral estoppel. After the Missouri court dismissed Petitioners' state court action, the Petitioners, who refuse to accept that they are wrong, filed a Motion to Amend the Judgment in which they sought a denial of Monsanto's motion to dismiss. As the federal district court stated in its order:

> [T]his is a matter where the plaintiffs, not happy with the final ruling of this court or the Eleventh Circuit's affirmance of that ruling, have gone to the state court and asked that court to reopen the identical subject on which this court has ruled, namely how much are the plaintiffs entitled to receive under the Most Favored Nation's clause. Whether the plaintiffs call it a motion to enforce settlement agreement, or a claim for breach of contract, the plaintiffs want a court to award them more money under the Most Favored Nation's clause. . . .

Petitioners' current appeal is yet another obvious attempt to circumvent the previous orders of the district court and the Eleventh Circuit. Petitioners now claim that they have been denied due process. (Pet. at 14). Instead, they have been given abundant process. As a desperate last resort, Petitioners seek another result in this Court of last resort. There is nothing in this Petition that warrants intervention by this Court.

In an effort to prove otherwise, Petitioners misstate the facts and findings of law from the decision below. For reasons set forth below, Petitioners' latest attempt to get the ultimate court to award it more money under the MFN clause should result in the denial of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

As the district court stated, the question before the court was a simple one. The question before the court, as presented by the Petitioners, was whether Monsanto was required to pay the Petitioners additional sums under the MFN clause of the settlement agreement due to the settlement of two other cases. The district court found that the settlement agreement was unambiguous and awarded Petitioners over 1.3 million dollars. The Eleventh Circuit affirmed this decision.

Petitioners have never been satisfied with the amount awarded and, in the most incredulous filing

before any court to date, they now interject race into this case. Petitioners erroneously state that the settlement which the African-American Petitioners in this case received was less than the amount that the predominantly white Alabamians received in the other two cases. (Pet. at 2). There is no factual basis for this outrageous characterization of the racial makeup of the Petitioners in these three cases. It is blatantly false: Petitioners in all three cases were racially mixed.

The Petition repeatedly mischaracterizes what the MFN clause required and how the per capita calculations were derived, in spite of the fact that the Eleventh Circuit found that it was an unambiguous contract. (Pet. at 2-6). Petitioners also erroneously and repeatedly state that Monsanto tried to purposely deprive these Petitioners of the benefit of the MFN clause and tried to avoid triggering it. (Pet. at 19-20). What Petitioners ignore is that they were represented by very capable attorneys in the negotiation of the Owens' settlement and the MFN clause, just as Monsanto was represented by counsel in the Owens case as well as the other two cases. It cannot be disputed that all attorneys involved owed a duty to represent their clients zealously in an attempt to ensure the best settlement for their clients. It is absurd for the Petitioners to now assert that Monsanto should have been looking out for the Owens' Petitioners' interest when it was negotiating the settlement in the other two cases.

Petitioners erroneously state that they have yet to be heard on their good faith arguments. (Pet. at 4). As the district court noted, "[t]hese [claims before the Missouri court] are the identical arguments presented to this court." The district court ruled on all issues raised by the Petitioners. Petitioners also erroneously state that nothing in the Missouri action threatens the district court's jurisdiction to enforce the settlement agreement. (Pet. at 11). As the district court stated:

> The court can only ponder the inherent conflicts which could arise should the plaintiffs be allowed to proceed with their state court litigation. What would happen if the state court found wholly in the defendants favor? Would the plaintiffs then argue that this court should enjoin the state court from ordering that the defendants are entitled to a refund of the sums they paid under this court's order? Similarly, what if the Missouri court found that the plaintiffs are entitled to some sum other than what this court awarded? Which judgment should prevail? The plaintiffs only recourse to receive more money based on settlements in other litigation against this defendant is through the MFN clause.

The entire amount awarded to Petitioners was paid by Monsanto to the clerk of the district court. To date, this entire amount remains in the clerk's office.

REASONS FOR DENYING THE PETITION

The decisions below neither conflict with a decision of this Court or any circuit court, nor do they implicate a federal question that has not been decided by this Court. Petitioners have not carried their burden of demonstrating any compelling reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The opinions below are consistent with this Court's relevant decisions which obligated the district court to enjoin Petitioners from relitigating another state court action.

Under the All Writs Act, federal courts have the power to "issue all writs necessary in aid of their respective jurisdictions." 28 U.S.C. § 1651 (2005). "Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1099 (11th Cir. 2004) (quoting *Procup v. Strickland*, 792 F.2d 1069, 1074 (11th Cir. 1986) (*en banc*)). The All Writs Act allows a court to issue a writ wherever "the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States*, 317 U.S. 269, 273, 63 S. Ct. 236, 239 (1942). This would include the power to enjoin *new* lawsuits that threaten the res judicata or collateral estoppel effects of the court's judgments. *See Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir. 1993).

This case law is entirely consistent with the facts of the current case. The district court explicitly found that Petitioners were entitled to recover over $1.3 million from Monsanto under the MFN clause. This was a final ruling. An appeal was taken from this ruling and affirmed. As a result of this final ruling and its affirmance on appeal, Monsanto was entitled to an injunction under the All Writs Act against any and all attempts by Petitioners to undermine the effect of the district court's order, especially through the relitigation of these issues in a new state court action.

A. The district court injunction was proper under the relitigation exception of the Anti-Injunction Act.

The "protect or effectuate its judgments" exception is better known as the relitigation exception. The source of this exception in § 2283 is the "well-recognized concepts of *res judicata* and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147, 108 S. Ct. 1684, 1690 (1988) (emphasis in original). Its purpose is to prevent "'the costly and judicially wasteful redetermination of issues' already decided by a federal court." *Daewoo Elecs. Corp. v. Western Auto Supply Co.*, 975 F.2d 474, 477 (8th Cir. 1992) (quoting *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 721 (5th Cir. 1990)); *see also NBA v. Minn. Prof'l Basketball, Ltd. P'ship*, 56 F.3d 866, 872 (8th Cir. 1995) (holding that the relitigation exception permits federal courts to "enjoin state court from

litigating claims and issues that the district court has already decided").

There is no requirement that the issue be related to the substantive merits of the suit in order to be the subject of an injunction. "The legislative policy that 'permits a federal court to enjoin state court action when a federal court has decided a suit on its substantive merits has equal force when a critical underlying issue unrelated to the substantive merits of the action has been litigated to finality.'" *In re SDDS, Inc.*, 97 F.3d 1030, 1037 (8th Cir. 1996) (quoting *Minn. Prof'l Basketball*, 56 F.3d at 871).

Petitioners argue that the district court never ruled on the claims asserted in the Missouri case. (Pet. at 14). In determining whether a prior judgment actually decided an issue, the court may consider the pleadings and evidence in the earlier case. *Santopadre v. Pelican Homestead & Savings Ass'n*, 937 F.2d 268, 273 (5th Cir. 1991). In *Santopadre*, one of the questions on appeal was whether the district court ruled on the issue of ownership of certain property. *Id.* at 270. The Fifth Circuit held that the lower court had ruled on the issue after they reviewed the pleadings and found that the plaintiff raised the issue in the Complaint and the defendant responded to that issue in its Answer. *Id.* at 273.

> In its order granting summary judgment, the district court does not explicitly discuss [the legal issue]. However, "[i]f an issue is raised and the party who has the burden fails in his proof and the issue is decided against him,

> he is just as much bound by collateral estoppel as though he had presented a barrel of testimony."

Id. at 274 (quoting *United States v. Silliman*, 167 F.2d 607, 617 (3d Cir. 1948), *cert. denied*, 69 S. Ct. 48 (1948)).

Likewise, Petitioners raised the breach of covenant of good faith and fair dealing in their pleadings before the district court. Monsanto responded to this issue in its oral arguments to the district court and in its brief to the Eleventh Circuit.[1] Clearly, to the extent the alleged claims for breach of good faith and fair dealing affected that to which Petitioners were entitled under the MFN clause, those claims have been resolved. Despite what Petitioners regard as the district court's lack of attention to this issue, the district court did rule on the breach of good faith issue.

Petitioners then argue that the other claims from the Missouri action were never presented before the district court. (Pet. at 14). Returning to the pleadings, the evidence is clear that these are not new and different claims but rather they have already been

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[1] Monsanto still maintains that Petitioners' claim for breach of the duty of good faith and fair dealing was without merit. There is no cause of action under Alabama law for such a breach under these circumstances. *See Lake Martin/Alabama Power Licensee Assoc., Inc. v. Alabama Power Co., Inc.*, 601 So. 2d 942 (Ala. 1992); *Tanner v. Church's Fried Chicken, Inc.*, 582 So. 2d 449 (Ala. 1991).

heard and ruled on by the district court. The first sentence of Petitioners' Amended Complaint in Missouri states that Petitioners are "asserting claims in contract and in tort arising out of Monsanto Company's refusal to pay the plaintiffs what they are due under a Most Favored Nations Clause." This is a clear admission by Petitioners that they are merely relitigating their Motion to Enforce Settlement Agreement.

Petitioners then list five counts in addition to the breach of good faith claim in their Missouri Complaint. Clearly, all other counts are directly related to, and interdependent upon, the alleged breach of the MFN clause raised in Petitioners' original Motion to Enforce Settlement Agreement before the district court. This is why Petitioners' prayer for relief seeks only "[m]onetary damages as are fair and reasonable as determined by the jury *for the failure of Monsanto to pay what it owed plaintiffs pursuant to the Most Favored Nations clause* plus prejudgment and post-judgment interest." There is no request for damages for any of these alleged "new claims" listed in the Complaint. As the district court stated, "[w]hether the plaintiffs call it a motion to enforce the settlement agreement, or a claim for breach of contract, the plaintiffs want a court to award them more money under the [MFN] clause. . . ." Regardless of how one chooses to label the theories under which additional sums are sought pursuant to the MFN clause, the undisputed fact is that the prior judgment of the district court, affirmed by the Eleventh Circuit, made

this very determination. Thus, Petitioners are precluded from relitigating the question of their entitlement under the MFN clause under the guise of some new legal theory.

Petitioners look to *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988) to support their argument that the Eleventh Circuit improperly allowed post hoc revision of its order. (Pet. at 10). The *Chick Kam Choo* opinion cited to *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970), regarding post hoc judgments. *Id.* at 148. In *Atlantic Coast Line*, it was clear that the district court had not ruled on the disputed issue because the record revealed that that issue had not even been argued before the Court. *Atl. Coast Line*, 398 U.S. at 290; *see Chick Kam Choo*, 486 U.S. at 148. The present case is different in that all of these issues have been argued by both sides before the district court as shown above. Therefore, the district court did follow the "essential prerequisite for applying the relitigation exception . . . that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148.

The present case is easily distinguished from *Atlantic Coast Line* on a number of grounds. First, there was already a final decision by the state court in that case. *Atl. Coast Line*, 398 U.S. at 283. Therefore, the district court was essentially acting in an appellate capacity to the Florida circuit court. There is no final decision by a state court in the present

case for which there is now "an improper attempt to seek federal appellate review of a state court decision." *Id.*

Second, in *Atlantic Coast Line* the district court had concurrent jurisdiction with the Florida court. Therefore, the "necessary in aid of jurisdiction" exception did not apply. *Id.* at 295-96. In the present case, the district court has retained exclusive jurisdiction over the settlement agreement.

Third, the district court's enjoinment of the 1969 state court decision in *Atlantic Coast Line* was not proper because the state court decision was based on a separate issue of law, which the 1967 district court did not decide. *Id.* at 288-90. However, in the present case, Petitioners are not making any argume 's in the Missouri court that have not already been nade in the district court below.

An affirmance of the district court's injunction in this case would be consistent with this Court's analysis and ruling in *Atlantic Coast Line*. In *Atlantic Coast Line*, the federal court's injunction would have allowed the union to avoid the adverse ruling from the state court. In reality, the union's request for injunctive relief was merely an attempt to usurp the state court's judgment – much like Petitioners' attempt to avoid the rulings of the district court and the Eleventh Circuit in the present case. This is why the injunction had to be denied in *Atlantic Coast Line*. In the present case, the opposite scenario is being played out. Petitioners argue that Monsanto is not entitled

to injunctive relief so that Petitioners can avoid a prior ruling from the federal courts. The exceptions to the Anti-Injunction Act are not a tool to avoid unfavorable rulings but to prevent a party from doing so. *See Chick Kam Choo,* 486 U.S. at 140 (stating "[t]he relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court"). That is why *Atlantic Coast Line* actually argues in favor of affirming the district court's injunction in the present case. This Court stated, "we are convinced that the union in effect tried to get the Federal District Court to decide that the state court judge was wrong in distinguishing [the earlier] decision." *Atl. Coast Line*, 398 U.S. at 293. This is exactly what Petitioners were attempting in the Missouri action – to correct the alleged "mistakes" of the district court as well as the Eleventh Circuit – and that is why this injunction was proper under the relitigation exception of § 2283. As the district court stated, "[t]he plaintiffs correctly state the law, but then lose sight of the fact that their latest attempt at litigation falls squarely within the relitigation exception."

B. The district court retained exclusive jurisdiction which mandated the injunction under the "necessary in aid of jurisdiction" exception of the Anti-Injunction Act.

In *Atlantic Coast Line*, this Court held that the "necessary in aid of jurisdiction" exception applied

when "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *See Atl. Coast Line,* 398 U.S. at 295. This Court also held that the language of this exception is broad. *Id.* In *White v. Eagle-Picher Indus., Inc. (In re Joint Eastern and Southern District Asbestos Litigation)*, the district court found that other "[c]ourts have interpreted the 'necessary in aid of jurisdiction' exception liberally. . . ." 134 F.R.D. 32, 37 (E.D.N.Y. 1990) (citing *Atl. Coast Line*, 398 U.S. at 295; *In re Baldwin-United Corp.*, 770 F.2d 328, 337 (2d Cir. 1985); *Three J Farms, Inc. v. Plaintiffs' Steering Comm. (In re Corrugated Container Antitrust Litig.)*, 659 F.2d 1332, 1334 (5th Cir. 1981), *cert. denied*, 456 U.S. 936, 102 S.Ct. 1993 (1982)).

The Eleventh Circuit's opinion in *Battle v. Liberty Nat'l Life Ins. Co.*, is instructive because the facts are similar to the present case. 877 F.2d 877 (11th Cir. 1989). In *Battle*, the plaintiffs were part of a large class. *Id.* at 879-80. The district court concluded seven years of complex litigation with a settlement agreement. *Id.* Five years later several class members filed similar actions against the same defendant in state court. *Wesch,* 6 F.3d at 1470; *see Battle*, 877 F.2d at 880. The district court enjoined these proceedings, and the Eleventh Circuit affirmed. *Battle*, 877 F.2d at 879. The injunction was "necessary in aid of" the district court's jurisdiction because the "state court suits, class actions which on their face challenge the

propriety of the [district court] judgment, can only undermine the district court's continuing jurisdiction over the case." *Id.* at 881.

The need to protect a federal court's jurisdiction is the strongest when it involves the enforcement of a settlement agreement. It is well-recognized that the enforcement of a settlement agreement "is more than just a continuation or renewal of jurisdiction, and hence requires its own basis for jurisdiction." *Flanagan v. Arnaiz*, 143 F.3d 540, 544 (9th Cir. 1998) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 378, 114 S. Ct. 1673, 1675-76 (1994)). A court retains continuing and exclusive jurisdiction over the enforcement of a settlement agreement by an order that includes a provision retaining jurisdiction or incorporating the terms of the settlement agreement in the order. *Id.* The district court did both in its April 25, 2001 order.[2] The district court retained exclusive jurisdiction to enforce the settlement agreement when it stated that: "[t]he Court retains continuing jurisdiction of this matter for the purpose of enforcing the Settlement Agreement. . . ." *See Battle*, 877 F.2d at 880-81 (holding "the 'need for exclusive jurisdiction in the federal district court' was recognized by the district court's explicit retention of jurisdiction in its final judgment") (quoting *United States v. Am. Soc. of Composers Authors and Publishers*, 442 F.2d 601, 603 (2d Cir. 1971)); *see also*, *United States v. Am. Soc. of*

[2] The settlement agreement retaining exclusive jurisdiction was the agreement of **all** parties.

Composers Authors and Publishers, 32 F.3d 727, 731-32 (2d Cir. 1994).

The reasoning behind this inferred exclusivity is that it would be nonsensical for a federal court to retain jurisdiction to interpret and effectuate its own judgment, yet allow a state court to construe what the federal court meant in its judgment. *Flanagan*, 143 F.3d at 545. During the eleven-year pendency of the instant case, the district court has had extensive involvement in resolving the many matters that came before it. The district court may be called on in the future to oversee other aspects of this settlement agreement. Any state court proceeding involving the settlement agreement will surely limit its ability to do so. Furthermore, it would likely unravel the settlement that these parties agreed to in 2001 and as the district court in *Battle* noted, "nullify this court's work in refining its Final Judgment over the last ten years, add substantial confusion in the minds of a large segment of the state's population [in this case a large segment of the population of Anniston, Alabama], and subject the parties to added expense and conflicting orders." *Battle*, 877 F.2d at 882 (quoting *Battle v. Liberty Nat'l Life Ins. Co.*, 660 F. Supp. 1449, 1457 (N.D. Ala. 1987)).

Clearly, the Missouri court, which has never heard or addressed a single issue in this case, should not now be called upon to interpret the district court's prior judgment which was affirmed by the Eleventh Circuit. To do so would constitute "'the costly and judicially wasteful redetermination of issues' already

decided by a federal court." *Daewoo Elecs. Corp.*, 975 F.2d at 477 (quoting *Quintero,* 914 F.2d at 721).

Petitioners do not dispute that the federal district court has retained *exclusive* jurisdiction over this case and the settlement agreement. Rather, they dispute that the district court took a narrow view of its jurisdiction that the claims presented in the Missouri action are outside of its scope. (Pet. at 23-24). Yet, all of this conduct and any claims arising from such conduct is necessarily addressed in the prior ruling of this Court. As the district court stated, "apart from the settlement agreement reached by the parties, the plaintiffs have no basis for claiming they are due anything." Even assuming *arguendo* that these issues were not addressed, the district court retained exclusive jurisdiction to address any issues arising from the settlement of any other litigation by Monsanto.

The cases relied on by the Petitioners, such as *Kokkonen v. Guardian Life Ins. Co*, 511 U.S. 375, 378, 114 S. Ct. 1673, 1675-76 (1994), are inapposite. This is not a case in which the position of Monsanto is dependent on some implied retention of jurisdiction as was the issue in *Kokkonen*. Here, there is an express reservation of jurisdiction – one which Petitioners have previously invoked. Its exclusivity and vitality cannot be extinguished simply because Petitioners did not secure all of the relief they wanted when they urged the court to exercise this jurisdiction previously.

Petitioners also rely on *Bender v. Allegra (In re T2 Medical, Inc. Shareholder Litigation)*, 130 F.3d 990 (11th Cir. 1997), in support of their argument that the lower court did not have jurisdiction over Petitioners' Missouri claims. However, Petitioners also state that "*Bender* is inapposite." (Pet. at 12). This reliance is misplaced. The Eleventh Circuit found that the motion to enforce the settlement agreement at issue in *Bender* was actually a contractually prohibited attempt to modify the settlement agreement and, therefore, the district court lacked jurisdiction to entertain plaintiffs' motion. *Id.* at 994-95.

Petitioners have completely mischaracterized *Bender*. The issue was not whether the district court had jurisdiction over a breach of good faith claim, but whether the plaintiffs' motion was really an attempt to modify the terms of the settlement agreement. *Id.* at 994-95. The *Bender* court ultimately held that the plaintiffs were seeking to invoke jurisdiction to effectuate the very relief which the underlying settlement agreement and decree prohibited. *Id.* at 995.

Unlike *Bender*, Monsanto invoked the jurisdiction of the district court to enjoin the Petitioners in the Missouri action in order to enforce the settlement agreement as it had already been ruled on by the district court – not to modify it. Petitioners have misinterpreted the *Bender* opinion in an attempt to achieve the very thing that the *Bender* court would not permit the plaintiffs in *Bender* to do, reinterpret a

settlement agreement to obtain more money from the defendant.

In summary, the facts are simple. The district court retained exclusive jurisdiction to enforce the MFN clause of the underlying decree and settlement. The district court had jurisdiction to hear claims arising out of the MFN clause. It heard these claims and found that Monsanto owed over $1.3 million. The district court clearly had the authority under either non-statutory exception to the Anti-Injunction Act to enjoin the Missouri proceeding. Furthermore, the injunction was mandated under the All Writs Act. As the district court stated, "[u]nder either . . . the result is the same." Both Acts recognize the authority to prevent relitigation of "an issue that previously was presented to and decided by the federal court." *Chick Kam Choo,* 486 U.S. at 147; *see also Klay,* 376 F.3d at 1092.

II. The Eleventh Circuit properly followed well-established recusal law that mandated the denial of Petitioners' Motion to Recuse.

The general law of recusal "does **not** require the judge to accept as true all allegations in determining whether a reasonable person would harbor doubts concerning [her] impartiality." *United States v. Bobo,* 395 F. Supp. 2d 1116, 1123 (N.D. Ala. 2004) (emphasis in original). "If a party could force recusal of a judge by factual allegations, the result would be a virtual 'open season' for recusal." *Id.* (quoting *United States*

v. Greenough, 782 F.2d 1556, 1558 (11th Cir. 1986)). "An unsubstantiated suggestion of personal bias or prejudice is insufficient to mandate recusal under section 455(a)." *Willner v. Univ. of Kans.*, 848 F.2d 1023, 1027 (10th Cir. 1988) (citing *United States v. Hines*, 696 F.2d 722, 729 (10th Cir. 1982)). Petitioners fail to support a charge of impartiality with relevant facts. *See Bobo*, 395 F. Supp. 2d at 1123. Legal reasoning and precedent reveal that the Eleventh Circuit correctly found no reasonable basis for Judge Johnson's recusal in this matter.

Furthermore, "[a] trial judge has as much obligation not to recuse [herself] when there is no reason to do so as [she] does to recuse [herself] when the converse is true." *United States v. Bray*, 546 F.2d 851, 857 (10th Cir. 1976) (citing *United States v. Ming*, 466 F.2d 1000 (7th Cir. 1972), *cert. denied*, 409 U.S. 915, 93 S. Ct. 235 (1972)); *United States v. Diorio*, 451 F.2d 21 (2d Cir. 1971), *cert. denied*, 405 U.S. 955, 92 S. Ct. 1173 (1972). The reason for this obligation to not recuse is to save precious judicial resources. *United States v. IBM Corp. (In re IBM Corp.)*, 618 F.2d 923, 933 (2d Cir. 1980). In *City of Cleveland v. Cleveland Elec. Illuminating Co.*, the court held that "disqualification is not favored in instances where . . . a single judge has acquired by experience, familiarity with a protracted, involved case which could not easily be passed on to a second judge." 503 F. Supp. 368, 370 (N.D. Ohio 1980). Certainly the present case commands the same disdain for recusal based on its own protracted course. Although Judge Johnson has not

been the judge of record for the entire pendency of this case, she has handled this case for more than eleven years. She has issued seventy-two orders and held numerous hearings during this time. Considering the complexity of this case, the number of plaintiffs involved, and the eleven years this litigation has already encompassed, it would be a waste of time and resources to now disqualify Judge Johnson on the basis of such baseless allegations.

The appearance of Mark White as counsel for Monsanto did not create a conflict of interest sufficient to justify the recusal of Judge Johnson. There is no per se disqualification rule based on past representation. Nonetheless, Petitioners argue that Mark White's former representation of Judge Johnson from 1998-1999 justified her recusal under 28 U.S.C. § 455(a), because her impartiality might reasonably be questioned. (Pet. at 14). In *Duke v. Pfizer, Inc.*, the district court denied a plaintiff's motion for recusal under similar circumstances. 668 F. Supp. 1031 (E.D. Mich. 1987). In that case, the prior representation of the judge had ended two years earlier. *Id.* at 1036. The court adopted a two-year period of repose as sufficient to cure any possible appearance of impropriety for a lawyer's past representation of a judge. *Id.* The court then stressed the need for such a standard:

> The recusal result for which plaintiff argues would bar lawyers who once represented a judge, as well as former law clerks, from the judge's court forever: that rule has difficult

> implications and should not be adopted. Members of the Bar are duty-bound to represent judges accused unfairly of judicial misconduct. . . . To penalize lawyers in this way would be a disincentive to representing judges and a disincentive to championing important social concerns about judicial decision-making.

Id.

Under this standard, Mark White's past representation of Judge Johnson would be irrelevant, because it ended four years before he entered an appearance on behalf of Monsanto in this case. To disqualify Judge Johnson despite this period of repose would only punish Mark White for representing Judge Johnson. It would further have a chilling effect on the ability of a judge to secure the counsel of their choice in matters in which they need representation. Finally, disqualification under these circumstances serves no purpose under § 455(a). No reasonable person would consider a lawyer's representation of a judge from four years earlier to affect that judge's impartiality. The Eleventh Circuit properly found that Mark White's prior representation of Judge Johnson was not grounds for recusal.

None of the cases cited by Petitioners involved recusal based solely on the past representation alone, as does the present case. *Cf. Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965) (where attorney's representation of judge was concurrent with other litigation he had before the same judge); *Potashnick v. Port*

City Constr. Co., 609 F.2d 1101 (5th Cir. 1980) (where attorney's representation of judge was concurrent with other litigation he had before the same judge and attorney held certain investments along with that judge). Therefore, none of these cases are relevant as to whether Mark White's defense of Monsanto should disqualify Judge Johnson. Petitioners have failed to cite any authoritative case law showing how Judge Johnson abused her discretion in denying this motion.

Likewise, the appearance of Starnes & Atchison, LLP as counsel for Monsanto did not create a conflict of interest sufficient to justify Judge Johnson's recusal. Petitioners' argument that the employment of William T. Johnson, III, a former associate with Starnes & Atchison, LLP, as a basis for recusal is disingenuous at best. Petitioners rely again on the general bias provision of § 455(a), as well as two fact-specific rules found in § 455(b), for support. First, they cite the rule that disqualification of a judge for bias is proper when a "person within the third degree of relationship" is acting as a lawyer in the proceeding. 28 U.S.C. § 455(b)(5)(ii). This argument is completely irrelevant because it is undisputed that William T. Johnson, III has never participated in Monsanto's defense. Furthermore, the fact that his law firm participated in the case does not mean that William T. Johnson, III was "acting as a lawyer in the proceeding" within the meaning of 28 U.S.C. § 455(b)(5)(ii). *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 463 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035, 98

S. Ct. 768 (1978) (rehearing denied) (citing *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 114 (7th Cir. 1977)) (in finding no abuse of discretion on the part of the district judge in declining to recuse, the Fifth Circuit noted that his son did not actively participate in Equifax's defense so as to be an acting lawyer under § 455(b)(5)(ii)).

Petitioners then argue that recusal is proper because William T. Johnson, III has a financial interest in the outcome of the proceeding. *See* 28 U.S.C. § 455(b)(5)(iii). This provision is also inapplicable. Courts have continuously found that "an employment relationship between a party and a judge's son or daughter does not per se necessitate a judge's disqualification." *In re Kan. Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1364 (8th Cir. 1996); *see also Jenkins v. Ark. Power & Light Co.*, 140 F.3d 1161, 1164-65 (8th Cir. 1998). "Rather, the determination of whether a conflict exists in a given situation is factually bound." *In re Kansas*, 85 F.3d at 1364. If the judge's relative is an associate in a law firm, "and the relative's compensation is in no manner dependent upon the result of the particular case before the judge, recusal is not mandated." *Bobo*, 395 F. Supp. 2d at 1123 (quoting Committee on Codes of Conduct, Advisory Opinion No. 58); *see also Equifax*, 557 F.2d at 456.

In *Equifax,* the district court judge's son was an associate of the law firm representing Equifax in a matter pending before the judge. *Equifax,* 557 F.2d at 456. The Fifth Circuit noted that the "'financial interest' provision might apply if the district judge's

son were a partner in the firm. But his status as an associate removes that fear. His salary interest as an associate is too remote to fall under this 'financial interest prohibition.'" *Id.* at 463.

Applying this law to the facts of the present case, it is clear that recusal is not warranted in this matter. Just as it is undisputed that William T. Johnson, III was never involved in Monsanto's defense, it is also undisputed that William T. Johnson, III was an associate rather than a partner with Starnes & Atchison, LLP. According to all relevant case law and his own testimony, William T. Johnson, III has no financial interest in the outcome of this case. Therefore, there is no basis for recusal under either §§ 455(b)(5)(ii) or (iii).

Petitioners cannot point to a single federal case where recusal of a judge was required solely because of the judge's child's employment with a law firm representing a party in the case. They only cite *Stephens v. Stephens*, a Georgia case, which is clearly against the weight of federal case law. 292 S.E.2d 689 (Ga. 1982). The Circuits that have addressed this issue have rejected such a tenuous basis for recusal. *See, e.g.*, *Equifax*, 557 F.2d at 456; *Jenkins*, 140 F.3d at 1764-65; *Fero v. Kerby*, 39 F.3d 1462 (10th Cir. 1994). As one of the justices in *Stephens* reminded the Georgia Supreme Court in his dissent, "[p]er se disqualifications are not only harsh, they most often lead to impractical results." *Stephens*, 292 S.E.2d at 692. In addition, Petitioners concede that when a judge's relative is merely "an associate in a law firm,

'recusal is not mandated.'" (Pet. at 19). Accordingly, it was clearly within Judge Johnson's discretion to not disqualify herself and she did not abuse this discretion. Therefore, Petitioners' Motion to Recuse was properly denied.

Neither Judge Johnson nor Starnes & Atchison, LLP were required under the general rules governing recusal to disclose the employment of William T. Johnson, III. The requirement that Petitioners cite for disclosure is a local court rule. It applies only to issues that "would or might" be grounds for recusal, as Petitioners note. (Pet. at 16). All of the relevant case law is clear that the employment of a judge's son as an associate in a law firm appearing before that judge is not alone sufficient grounds for recusal. Therefore, there was no need to disclose this information.[3]

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[3] Petitioners also assert that Mr. White should have disclosed his relationship with Judge Johnson. (Pet. at 16.) As Mark White's affidavit demonstrates, however, Petitioners' counsel was aware of Mark White's prior representation of Judge Johnson at the time Mark White entered an appearance as counsel on behalf of Monsanto. Indeed, the matter and the representation were widely known throughout the Alabama bar, having been the subject of considerable media attention. *Id.* Likewise, William T. Johnson, III's employment at Starnes & Atchison, LLP was also a matter of public record and something which Petitioners' counsel should have known at the time Starnes & Atchison, LLP entered an appearance on behalf of Monsanto. (It should be noted that at that time Starnes & Atchison, LLP previously represented Monsanto in *Ex parte Monsanto*, 862 So. 2d 595 (Ala. 2003)).

III. The Eleventh Circuit correctly upheld the denial of Petitioners' discovery request and request for evidentiary hearing.

The Eleventh Circuit found that the contracts at issue are unambiguous. Thus, there was no reason to allow discovery. Petitioners wanted this discovery for the purpose of reopening the litigation of the MFN clause of the settlement agreement. The purpose of Petitioners' discovery request was to find a way to obtain more money under the MFN clause.

Petitioners are once again arguing that they are merely seeking to litigate claims that have never been determined by any court. (Pet. at 14). However, as the district court stated: "[t]he sole issue that was before this court and is now before the Missouri court, is whether or not the defendant breached this obligation under the MFN clause." According to Petitioners' own words, the Missouri case: "aris[es] out of Monsanto Company's refusal to pay the plaintiffs what they are due under a Most Favored Nation's Clause." The district court as well as the Eleventh Circuit have already settled the issues Petitioners brought before the Missouri state court. The Eleventh Circuit stated that it found: " . . . no error in the court's interpretation of the relevant provisions and thus in its decision ordering [Monsanto] to pay the difference in the per capita gross cash recoveries, i.e. $1,337,352.20." Petitioners chose not to seek review of that Eleventh Circuit's decision before this Court.

Finally, contrary to Petitioners' assertion, the request they sought pursuant to the Motion to Enforce Settlement Agreement was granted; however, Petitioners merely are dissatisfied with the amount they received and, in desperation, turn to this Court for relief.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the Petition. Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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November 30, 2007